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No. 88-2109

IN THE
# Supreme Court of the United States

OCTOBER TERM, 1989

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THE STATES OF KANSAS AND MISSOURI,
AS PARENS PATRIAE,
*Petitioners*,
v.

THE KANSAS POWER & LIGHT COMPANY
and
UTILICORP UNITED, INC.,
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## BRIEF FOR THE STATE OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF THE STATE OF ILLINOIS

Illinois has two distinct interests in this action. The first interest is the State's ability to vindicate consumer rights as *parens patriae* through an antitrust action. Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (hereinafter "Hart-Scott-Rodino Act") empowers the States to bring antitrust actions on behalf of consumers. As one of the States that has taken the lead in enforcing the antitrust laws on behalf of its citizens,[1] Illinois has a strong interest in preserv-

[1] See, e.g., *Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (en banc), *cert. denied*, 109 S. Ct. 543 (1988) *on remand*, 58 U.S.L.W. 2429 (C.D. Ill. Jan. 2, 1990).

ing its right to represent and obtain recovery for its consumer citizens, be they direct or indirect purchasers.

Additionally, Illinois has a more immediate interest in the resolution of the legal issue presented in this case. In *Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (en banc), *cert. denied*, 109 S.Ct. 543 (1988) (hereinafter "*Panhandle*"), the Seventh Circuit permitted Illinois to maintain an antitrust action on behalf of residential natural gas consumers overcharged by an interstate supplier of natural gas. The natural gas system in Illinois operates in essentially the same manner as the systems in place in Kansas and Missouri, and Illinois consumers were paying overcharges similar to those paid by Kansas and Missouri consumers. It is likely that the outcome of this case will be dispositive of the identical issue in *Panhandle* notwithstanding that the facts in *Panhandle* are somewhat stronger than the facts in the instant case.[2]

This Court should reverse the Tenth Circuit and approve the decision of the Seventh Circuit in *Panhandle* because, as contended by the States of Kansas and Missouri, the cost-plus exception to *Hanover Shoe* and *Illinois Brick* clearly applies to purchases of natural gas by residential consumers. Considering that—as we shall show—*Hanover Shoe* and *Illinois Brick* do not preclude this action from being maintained by an indirect purchaser consumer under § 4 of the Clayton Act, the Court need not address whether in some circumstances the

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*appeal docketed*, No. 90-1231 (7th Cir. 1990); *Illinois ex rel. Hartigan* v. *Matsushita Electric Corp. of America*, No. 89 Civ. 2789 (S.D.N.Y.) (settled 1989); *Greater Rockford Energy and Technology Corp. et al. and Illinois ex rel. Hartigan* v. *Shell Oil Co. et al.*, No. 88-2211 (C.D. Ill., Danville Division, filed June 1988); *Illinois ex rel. Hartigan* v. *Minolta Corp.*, No. 86-3075 (D. Md.) (settled 1987).

[2] After the Seventh Circuit sustained the Attorney General's right to file suit on behalf of consumers, the district court dismissed the case on the merits. See 58 U.S.L.W. 2429 (C.D. Ill. Jan. 2, 1990). The case is on appeal. 7th Cir. No. 90-1231.



Hart-Scott-Rodino Act authorizes a State to file a *parens patriae* action on behalf of an indirect purchaser even if such an action could not be brought by the indirect purchaser under § 4 of the Clayton Act.

This brief *amicus* describes in detail the regulatory system in Illinois and most other States which provides the factual context for this case as it did in *Panhandle*. The brief then applies the rationale of the *Hanover Shoe/Illinois Brick* doctrine to that regulatory scheme. In the course of this discussion, we describe fully Judge Posner's analysis in *Panhandle* which is contrary to—and we submit much sounder than—the opinion of the court below in the present case. In this way, we seek to fulfill the obligation of an *amicus* to "bring[] relevant matter to the attention of the Court that has not already been brought to its attention by the parties." Cf. U.S. Supreme Court Rule 37.1.

## SUMMARY OF ARGUMENT

In Point I of this Brief we show that in most States utility regulations require, as a matter of law, that the cost of natural gas to a utility be completely passed on to its residental customers (hereinafter "customers" or "consumers"). Because a utility receives revenue based upon its capital investment, it is entitled to recover its expenses from consumers. The utility's cost for gas from the pipeline company is not surprisingly treated as an operating expense of the utility. Furthermore, more than 40 States include "purchased gas adjustment" clauses (hereinafter "PGA clause") in the tariffs of utilities to ensure that all wholesale gas costs are passed on penny for penny regardless of fluctuations in the price of gas throughout the year.

PGA clauses function precisely like pre-existing cost-plus contracts. As our description of the operation of PGA clauses in Illinois demonstrates, the PGA clause itself is straightforward evidence that gas costs are

automatically passed-on. There can be no question that consumers are injured in the exact amount of that injury. No econometric models formulated to determine the effect on consumers of any overcharge by a pipeline need be introduced. Moreover, monthly and annual filings which utilities in Illinois are required to submit to the Illinois Commerce Commission specify the difference between the utility's actual costs as recorded in its books and the utility's revenue arising through its application of the Gas Charge formula. Additionally, consumers' monthly gas bills clearly identify the volume of gas delivered to and rate charged individual consumers. Hence, for each residential consumer of natural gas it can be established that (i) all natural gas costs were passed on to him or her and (ii) the exact volume and price of the purchased gas. Accordingly, it is easy to determine the damages incurred by individual consumers stemming from overcharges in the price of natural gas.

Point II of the brief demonstrates that the reasons for the general rule established in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (hereinafter "*Hanover Shoe*"), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (hereinafter "*Illinois Brick*"), that only the direct purchaser may sue under § 4 of the Clayton Act for an illegal overcharge, are not present under the regulatory system described in Point I. "The *principal* basis for the decision in *Hanover Shoe*," wrote Justice White in *Illinois Brick*, "was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model,' 392 U.S. at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." 431 U.S. at 731-32 (emphasis added). Because the cost of any illegal overcharge must be passed on penny for penny by the utility to the consumer, and its amount is readily ascertainable under filings which the utility is required to make, the difficulties with which the Court was concerned in *Hanover Shoe* are eliminated. *Hanover Shoe* "recognize[d] that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." 392 U.S. at 494. Under the regulatory system here present, the conditions for such an exception are clearly satisfied.



Contrary to the view of the court below, *Hanover Shoe* did not decide and its rationale does not require that a pre-determined, "fixed quantity" of goods be contracted for in order to qualify for the "cost-plus" exception. No such limitation was stated in *Hanover Shoe*. As Judge Posner thoroughly explains in *Panhandle*, permitting consumers to maintain an action will not create an "apportionment" problem, as the Tenth Circuit believed in insisting upon a "fixed quantity" contract. This Court's concern in *Illinois Brick* was that apportioning the degree or extent of injury caused by the *same sale* would be extremely difficult, as well as burdensome, upon the judiciary. Under the facts of this case, however, the direct and indirect purchasers do not sue to recover for injuries caused by the same sale. Rather, consumers are suing for overcharges with respect to the gas they purchased, and utilities sue for damages due to lost sales. Determining the amount recoverable for such injuries is a familiar element of damage calculation in antitrust actions.

Because the nautral gas regulatory systems in Kansas and Missouri operate in essentially the same manner as Illinois' system, the foregoing analysis requires reversal of the judgment below.

## ARGUMENT

### I. AS A MATTER OF LAW IN ILLINOIS AND MOST OTHER STATES, THE COST OF NATURAL GAS IS PASSED ON, PENNY FOR PENNY, BY UTILITIES TO RESIDENTIAL CONSUMERS

#### A. Purchased Gas Adjustment Clauses Ensure That a Utility Passes on to Residential Consumers Its Entire Cost of Natural Gas, Notwithstanding Day to Day Fluctuations in the Price of Gas

Regulations in most States expressly provide that public utilities pass on their entire wholesale cost of natural gas to their customers, residential consumers, on a penny for penny basis. Underlying this practice is a fundamental element of public utility regulation: a public utility does not earn a profit on the gas it distributes. Rather, the utility receives a "revenue requirement" which provides the utility sufficient funds to cover its capital investment,[3] a reasonable rate of return on that investment and its operating expenses.[4] Foremost among these operating expenses is the wholesale cost of natural gas that the utility pays to its suppliers.[5] A $5 increase in the price of gas paid by the utility increases its operating expenses by $5, which increases its revenue requirement

[3] The primary component of the capital investment is the original cost of the utility plant in service, less depreciation. Other components included in the rate base by many States are materials and supplies, gas in storage and prepaid gas, and working capital. 2 American Gas Association, *Regulation of the Gas Industry* § 40.04[2][b] at 40-22 (1989).

[4] This can be translated into a simple formula: (Rate Base × Rate of Return) + Operating Expenses = Revenue Requirement.

That revenue requirement is, of course, attained by charging customers for the gas that is delivered to them. As this formula indicates, there is a direct, one to one ratio between operating expenses and the revenue requirement. Thus, subject to regulatory review, operating expenses are included in the rates charged to consumers.

[5] 2 American Gas Association, *supra* note 3, § 26.03, at 26-6.



by $5. Thus, the utility can and must charge its customers precisely $5 more for that amount of natural gas it receives. When the cost of gas to a utility changes, the utility must change its rates in order that its revenue will reflect its changed operating expense.

The most commonly used mechanism for adjusting a utility's rates in response to changes in the wholesale price of gas is the "purchased gas adjustment" clause (hereinafter "PGA clause"). The origin and function of PGA clauses are described by Judge Posner in *Panhandle*:

> With the rapid and unanticipated increases in fuel prices during the 1970's, utilities pressed for and obtained the right to include automatic fuel pass-through provisions in their contracts with customers, provisions that would allow the utility to pass on every dollar in higher prices that it paid for gas or other fuels to its customers without going through the time-consuming process of obtaining regulatory authorization to raise rates. [A57.] [6]

In other words, PGA clauses establish a pre-existing mechanism by which increased wholesale gas costs to a utility will be *completely* passed on to its consumers.

#### B. Purchased Gas Adjustment Clauses Allow Residential Consumers to Prove Simply and Without Econometric Models That a Utility Has Passed its Natural Gas Costs on to Consumers (Indirect Purchasers) on a Penny for Penny Basis

PGA clauses are used in more than 40 States.[7] Though obviously different in certain details, they operate in es-

[6] Citations to *Panhandle* and the decision below will refer to the applicable page in the Appendix of the Petition for a Writ of Certiorari, in which the two decisions are reprinted at A43 *et seq.* and A1 *et seq.* respectively.

[7] National Assoc. of Regulatory Utility Commissioners, 1988 Annual Report 434-35. In States where PGA clauses are not used, retail gas prices may be adjusted if (i) a utility applies for a rate increase when the price of natural gas increases or (ii) the

sentially the same manner.[8] A review of the uniform PGA clause utilized in Illinois demonstrates how simple it is to prove that a utility's entire wholesale cost of natural gas has been passed on to its residential customers. The uniform PGA clause used in Illinois is prescribed in Illinois Administrative Code title 83, § 525 *et seq.*, and is set forth in the Appendix to this Brief. Illinois' PGA clause provides a utility with two options regarding how it may formulate its rate (called a "Gas Charge" in the PGA clause). Ill. Admin. Code tit. 83, § 525.10 (1985). The utility may charge a monthly rate based on a formula contained in § 525.20, or it may use a "base charge" and make monthly adjustments to conform to actual gas costs, as determined by that same formula.[9] In either event, the critical factor is that under the formula set forth at § 525.20, the full wholesale cost of gas is included as part of the "Gas Charge." Consequently, the entire cost of each utility's gas is passed on to consumers, regardless

State regulatory commission institutes a rate investigation. 2 American Gas Association, *supra* note 3, § 40.03, at 40-12 to 40-18.

[8] A number of States, including Illinois, have prescribed in their regulations the PGA clause to be used by all utilities within the State. These are called "uniform PGA clauses." In other States, the gas distributor submits its own clause for regulatory commission approval. 2 American Gas Association, *supra* note 3, § 40.06, at 40-88.

[9] The formula is:

$$GC = \frac{G + MG + SG \pm ST + PS \pm SE - C \pm RB}{P(1\text{-}U)} \times 100$$

This formula basically states that the Gas Charge (GC) equals the wholesale cost of natural gas (G) plus several other costs, divided by quantity (P represents the total units of gas delivered to the utility's customers from which is subtracted a small percentage representing gas which is unaccounted for (U)). The formula provides the utility with no leeway to absorb some of the increased costs of natural gas (or, conversely, to keep the gas charge at a steady rate when the cost of gas decreases).



of fluctuations in the price of gas to the utility.[10] Utilities are not permitted to charge any other price. Ill. Rev. Stat. ch. 111 2/3 ¶ 9-240 (1988).

The actual computation of the monthly Gas Charge under the PGA is strictly a mechanical function. The method by which CILCO computes its Gas Charge is illustrative. CILCO board members and senior management are not consulted. Ill. Br. App. at 37, para. 7. The actual responsibility to compute the Gas Charge is reposed with a lower level employee subject to supervisory oversight by CILCO's Manager of Rates & Regulatory Affairs and the Gas Supply Managers. Ill. Br. App. at 36, paras. 2-7. This clerk type employee has no discretion or authority to decline to pass on to CILCO's customers the cost of gas paid to Panhandle. Ill. Br. App. at 37. No economists need be consulted; and no econometric or other models need be applied. No costs are absorbed; the PGA clause must be and is followed.

A utility must file a monthly statement with the Illinois Commerce Commission specifying the Gas Charge that will be in effect for each succeeding month. Ill. Admin. Code tit. 83, § 525.10(d). Due to accounting differences between a utility and its suppliers, the gas rate charged consumers often does not fully correspond to the gas costs paid by the utility.[11] Under §§ 525.50 and

[10] For example, in 1983 and 1984, purchases of gas from Panhandle Eastern Pipeline Corp. by the Central Illinois Light Company (hereinafter "CILCO"), the direct purchaser of natural gas in *Panhandle*, amounted respectively to $181,472,132.18 and $165,664,969.60. Appendix to Brief for Appellee State of Illinois at 44 (7th Cir. No. 85-2601) (hereinafter "Ill. Br. App."). Every penny of the cost of this gas sold to CILCO flowed directly through to CILCO's customers pursuant to the uniform PGA clause.

[11] For example, according to Harold E. Shutt, Chief Engineer of the Illinois Commerce Commission in 1985, there is a time lag between when a wholesale cost increase occurs and when CILCO passes it on. This occurs for three reasons:

> (a) a lag occurs between the date Panhandle [the pipeline] delivers gas to CILCO and invoices CILCO; (b) a lag occurs

525.60, a utility submits an annual and a monthly filing which specifies the difference between the utility's actual costs as recorded in its books and the utility's revenue arising through its application of the Gas Charge formula. That balance (known as the "reconciliation balance") is refunded to the consumer when the utility has charged too much and is recovered by the utility when it charged too little, pursuant to a formula set forth in § 525.60. This ensures that the actual cost of natural gas is passed on penny for penny to the consumer.

### C. The Information Contained in a Utility's Required Regulatory Filings and Its Monthly Gas Bills to Consumers Allow Residential Consumers to Establish Antitrust Damages Simply and Without Econometric Models

The monthly and annual filings a utility is required to submit pursuant to its PGA clause provide a readily accessible reference to the pricing and volume information needed by litigants to establish the price charged by a utility to its consumers, and the volume of gas sold. Furthermore, the Illinois Public Utilities Act requires that utilities make and maintain accurate accounting records. Ill. Rev. Stat. ch. 111 2/3 ¶¶ 5-102, 5-107 (1988).

Proving the injury incurred by an individual consumer is also extremely easy and straightforward. For example, Illinois requires that each monthly bill sent by CILCO to its customers contain the following three components:

> (1) an amount per customer not dependent on the amount of gas used; (2) an amount per therm of gas used, calculated to recover a share of fixed expenses and provide a profit margin; and (3) a gas charge factor. [*Panhandle* panel opinion, 839 F.2d 1206 at 1208 (7th Cir.), *rev'd*, on other grounds, 852 F.2d 891 (1988).]

between the date CILCO delivers the gas to a customer and invoices the customer; and (c) a lag occurs between the date CILCO files its monthly PGA filing and the effective date of the filing. [Ill. Br. App. at 53.]



See also Ill. Br. App. at 115; Ill Admin. Code tit. 83 § 500.330(a)(B); and Ill. Br. App. at 75-84, 85-103. Computing damages, therefore, requires no more than (i) calculating the difference between CILCO's purchase price of Panhandle's gas and the lawful price that would have been charged for the gas if no violation had occurred; (ii) dividing the total illegal overcharge by the number of units of Panhandle gas sold to compute the per unit amount of the overcharge; and (iii) multiplying the per unit amount of the overcharge by the number of units purchased by each consumer. Once the amount of the overcharge has been determined, calculating each consumer's damages is simple.

## II. WHEN A PUBLIC UTILITY PASSES ON AN ILLEGAL OVERCHARGE, PENNY FOR PENNY, ITS CUSTOMERS AND THE STATE (AS *PARENS PATRIAE*) ARE THE PROPER PARTIES TO MAINTAIN AN ACTION UNDER *HANOVER SHOE* AND *ILLINOIS BRICK*

### A. The Difficulties Which Led to the Result in *Hanover Shoe* and *Illinois Brick* Are Not Applicable Under the Regulatory System Described in Point I

As *Illinois Brick* made clear:

> In *Hanover Shoe*, this Court held that except in certain limited circumstances, a direct purchaser suing for treble damages under § 4 of the Clayton Act is injured within the meaning of § 4 by the full amount of the overcharge paid by it and that the antitrust defendant is not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge. [431 U.S. at 724-25 (footnote omitted).[12]

[12] In the accompanying footnote, the Court said:

The Court [in *Hanover Shoe*] cited, as an example of when a pass-on defense might be permitted, the situation where "an

In *Illinois Brick*, the Court held, as a corollary, that an indirect purchaser should not be allowed to sue under § 4 on a pass-on theory to recover damages from a defendant unless the defendant would be allowed to use a pass-on defense in a suit by a direct purchaser.

The first ground articulated by the Court for applying the pass-on rule equally to plaintiffs and defendants was that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants." *Id.* at 730. For, the Court explained:

> A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendant—by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever. [431 U.S. at 730-31 (emphasis in original).]

This ground for decision is not germane to the present case because the dispute is between the utilities and the States as to *which* may sue the pipeline company. Both sides acknowledge that only one *or* the other may do so with respect to the injury resulting from the overcharges which were passed on to the residential consumers (indirect purchasers) of the natural gas.[13]

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overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged * * *" 392 U.S., at 494 * * *." [431 U.S. at 724 n.2.]

[13] It is not controverted that the direct purchaser utility company would retain the right to sue for lost profits, an injury and cause of action separate and distinct from the injury incurred by the consumer purchasers of the gas. See pp. 20-21 *infra*.



The second ground for rejecting use of offensive pass-on stated in *Illinois Brick* was that "the reasoning of *Hanover Shoe* cannot justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments." 431 U.S. at 731. "The *principal* basis for the decision in *Hanover Shoe*," wrote Justice White in *Illinois Brick*, "was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model,' 392 U.S., at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." 431 U.S. at 731-32 (emphasis added). In an accompanying footnote, the Court demonstrated that

> this rationale was more important in the decision to bar the pass-on defense than the second reason [in *Hanover Shoe*]—the concern that if pass-on defenses were permitted indirect purchasers would lack the incentive to sue and antitrust violators would retain their ill-gotten gains, * * * is shown by the fact that the Court recognized an exception for pre-existing cost-plus contracts, which "mak[e] it *easy to prove* that [the direct purchaser] has not been damaged." 392 U.S. at 494. [431 U.S. at 732, n.12 (emphasis added in *Illinois Brick*).] [14]

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[14] The foregoing is confirmed by *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 475 n.11 (1982):

> If there is a subordinate theme to our opinions in *Hawaii* and *Illinois Brick*, it is that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. Where consistent with the broader remedial purposes of the antitrust laws, we have sought to avoid burdening § 4 actions with damages issues giving rise to the need for "massive evidence and complicated theories," where the consequences would be to discourage vigorous enforcement of the antitrust laws by private suits. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*,

But the "uncertainties and difficulties," and consequent "costs to the judicial system * * *" which troubled the Court in *Hanover Shoe*, are eliminated by the regulatory scheme described in Point I of this Argument.

The Tenth Circuit made much of the question as to whether consumers or utilities would have a greater incentive to file suit. However, as the Court explained in *Illinois Brick*, this consideration was not decisive in *Hanover Shoe*:

> The amount of the stake that the customers of the direct purchaser have in a lawsuit against the overcharger is not likely to depend on whether they buy under a cost-plus contract or in a competitive market, but the Court allowed a pass-on defense in the former situation because the pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser. [431 U.S. at 732, n.12.]

Just as the lack of incentive was not a reason for rejecting the cost-plus exception, it is not a reason to reject the exception in the present regulatory context.

### B. *Hanover Shoe* Authorizes Indirect Purchasers Under Circumstances Akin to a Cost-Plus Contract to Maintain an Action Under Section 4 of the Clayton Act

*Hanover Shoe* did not establish a bar to the pass-on defense in any and all circumstances:

> We recognize that there might be situations—for instance, when an overcharged buyer has a preexisting "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the

*supra*, at 498. Thus we recognized that the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system. See *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972); *Illinois Brick Co.* v. *Illinois*, *supra*, at 741-42.



> considerations requiring that the passing-on defense not be permitted in this case would not be present. [392 U.S. at 494.]

In *California v. ARC America Corp.*, 109 S.Ct. 1661, 1666 n.6 (1989), the Court stated with respect to its *Illinois Brick* decision that "[i]ndirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them." Because in this case the utility is required to pass on every penny of the overcharge, the cost thereof to the consumer is especially "easy" to prove, and "the considerations requiring that the passing-on defense not be permitted in [*Hanover Shoe*] would not be present." 392 U.S. at 494.

### C. The Tenth Circuit Erred in Concluding that the Cost Plus Exception Must Include a Fixed Quantity Contract

The Tenth Circuit in the instant case "interpret[ed]" the cost-plus "exception as requiring a preexisting cost-plus contract for a fixed quantity." A8, *quoting Illinois Brick*, 431 U.S. at 735-36.[15] This view was squarely rejected by the majority of the *en banc* court in *Panhandle*. A45-A47.[16] It perhaps suffices that no such limitation was expressed in *Hanover Shoe*'s original for-

[15] The Tenth Circuit's quotation was as follows:

> *Hanover Shoe* indicated the narrow scope it intended for any exception * * * by citing, as the only example * * * a pre-existing cost-plus contract. In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. [*Id.*]

[16] It may be pertinent to note that *Panhandle* is not an instance of a decision in which a lower court, due perhaps to deeply-felt views, reads a precedent of this Court with a hostile eye. To the contrary, the opinion expresses strong approval of *Illinois Brick*: "An additional complication that further demonstrates the wisdom of the [*Illinois Brick*] *decision* * * *." [A49.]

mulation of the cost-plus exception (392 U.S. at 494, quoted at pp. 14-15, *supra*), and the circumstances of *Illinois Brick* provided no occasion for defining the contours of the exception. More fundamentally, as Judge Posner wrote in *Panhandle*:

> We do a disservice to the Court by wrenching its words out of context and giving them a talismanic significance; we make language a trap rather than a mode of communication. The Supreme Court has never adverted to the issue involved in the present case, and we must consider that issue in relation to the rationale of *Illinois Brick* rather than to isolated phrases in the Court's opinion. [A47.]

This is clearly the correct method for reading this Court's precedents. For, as Chief Justice Burger cautioned in sustaining the rights of consumers to sue under Clayton § 4, "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979).

In sum, no "fixed quantity" limitation on the cost-plus exception has been established as a matter of *stare decisis*, as the Tenth Circuit thought. It remains to be determined whether such limitation *should be* adopted as a matter of principle, that is, in accordance with the rationale underlying *Hanover Shoe* and *Illinois Brick*. In support of that restriction, the Tenth Circuit said:

> The apparent reason for the fixed-quantity requirement to the cost-plus exception is simply that there would exist no problem of apportionment between the direct and indirect purchasers. In this case the problem of apportionment would exist even if all of the overcharge was passed on because there still exists the issue of decreased residential demand caused by the higher price. [A13.]

This cursory statement is based on a misconception of the "apportionment" problem which troubled this Court



in *Hanover Shoe* and *Illinois Brick*. In its thorough examination of this question in *Panhandle* (A50-A56), the Seventh Circuit carefully differentiated the problem of apportioning the cost of an overcharge along a chain of distribution which was involved in those cases from the problem of decreased residential demand as in *Panhandle* and in this case. Judge Posner did so in the context of demonstrating that "the reasons for confining the right to sue to the direct purchaser" (A49) do not require that the cost-plus exception be limited to "fixed quantity" contracts.

The *Panhandle* court began this part of its analysis by observing that "[w]here the direct purchaser has a cost-plus contract with his customers that requires them to buy a fixed quantity, * * * [t]here is no longer a problem of apportionment, because the whole of any price increase will have been passed on to the customers by virtue of the contract." A50.[17] In a case like *Panhandle* (and the instant case), the court continued, "where cost-plus pricing is imposed by public utility regulation rather than by a purely private, purely voluntary contract, the reasons balance out slightly differently, but the case for applying the cost-plus exception of *Illinois Brick* is no weaker once the balance is restruck." *Id.* For, "[a]lthough the amount of gas purchased by a utility's customers is not fixed in their contract with the utility * * *, the special character of a public utility eliminates the problem of apportionment, here with re-

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[17] The second reason for confining the right to seek damages to the direct purchaser, the *Panhandle* court pointed out, "survives" under a cost-plus fixed-price contract. "Nevertheless the Supreme Court has said that the indirect purchaser may sue if he has a cost-plus contract with the direct purchaser." A50. This further confirms the primacy "of the uncertainties and difficulties" and "the costs to the judicial system and the efficient enforcement of the antitrust laws" to this Court's rejection of the pass-on theory in most circumstances. See *Illinois Brick*, 431 U.S. at 731-32, quoted at p. 13, *supra*.

spect to the only class of customers that we believe should be allowed to sue, the residential customers." A51.

We shall not here reiterate the court's entire demonstration of the foregoing proposition, but will confine ourselves to the points which bear most forcefully against the Tenth Circuit's view that a "fixed quantity" contract should be a prerequisite for applying a cost-plus exception to *Illinois Brick*. First, the *Panhandle* court showed why regulation performs the same function as does a fixed quantity commitment in situations where the free market is permitted to operate:

> The significance of the regulatory setting is that if regulation keeps a utility's rates below what it would like to charge, the utility will raise those rates by the full amount allowed by the regulatory commission unless such an increase would carry the utility above its optimum rate. An unregulated firm would not do that, since as we have noted an uncontested profit maximizer will always find it in its best interest to swallow a part of any cost increase that it experiences unless its customers are committed to a fixed quantity. [A53.]

The effect of the mandated pass-through provision was then explained:

> The "Uniform Purchase of Gas Adjustment Clause" that Illinois by statute requires CILCO to include in its contracts not only entitled but directed CILCO, if it paid Panhandle an extra penny per million cubic feet of gas, to add exactly one penny to each customer's bill for every Mcf of gas sold to that customer. So if all of its customers had continued buying the same amount of gas CILCO would have suffered no loss on account of the overcharge. [A53-54.]

The *Panhandle* court next turned to the loss due to the overcharge which the utilities do bear, and to which the Tenth Circuit in this case attached great significance:



> To the extent that CILCO lost residential sales because it was charging a higher price—and no doubt it lost some sales—the loss was not passed on to CILCO's customers (at least in any sufficiently direct way to escape the rule of *Illinois Brick*) and hence is not a component of the customer's damages. *But by the same token this is not a case where successive links in the chain of distribution are claiming damages in respect of the same transaction. There are, instead, two completely different sets of transactions.* One consists of sales to CILCO followed by resale to its residential customers; on these sales the entire overcharge came to rest on the residential customers and they alone suffered damage and can (on the view we take of the case) recover damages. The other set of transactions consists of the sales that CILCO lost because some customers balked at the higher rates; on these sales (or rather nonsales) the only loser is CILCO, and only CILCO can sue. [A54 (emphasis added).]

"Proof of loss of CILCO's lost sales," Judge Posner continued, "would also be straightforward—at least as straightforward as is possible in an antitrust case." A55. The task "is not always easy, but it is a conventional aspect of calculating damages in antitrust cases; it has to be done in every case where the plaintiff claims to have lost sales because of the defendant's unlawful conduct and the defendant argues that the loss was due partly or entirely to other factors." *Id.*, citing cases, including the familiar *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). He then reached the heart of the matter:

> More important, it is a problem unrelated to the problem the Supreme Court wrestled with in *Hanover* and *Illinois Brick*. The Court was concerned with the situation where two purchasers of the same thing—the initial purchaser and the purchaser from the initial purchaser—are or could be complaining that both had been hurt, and the problem

> is to apportion the loss between them. Here only the residential consumers can complain about a loss from the overcharge on the gas they bought, while only CILCO can complain about a loss caused by the overcharge on gas that the residential consumers did not buy. [A56.]

The foregoing is entirely sound. *Hanover Shoe* illustrated the difficulty of showing "what effect a change in a company's price will have on its total sales" by listing the "wide range of factors [which] influence a company's pricing policies." 392 U.S. at 492-93. The essential point was that, due to the complexity of a company's pricing decisions, a determination of the impact of an illegal overcharge by each participant in the chain of distribution, as would be required to establish the applicability of the pass-on defense, would normally prove to be an "insurmountable" task. *Id.* at 493. The Court did not regard the difficulty of proving damages accruing from lost sales as an independent ground for disapproving the pass-on defense; as *Panhandle* pointed out, such calculation is a familiar aspect of antitrust damage suits. Nor did *Hanover Shoe* (or *Illinois Brick*) so much as suggest that when a particular antitrust violation causes different kinds of injury to different classes of plaintiffs, only one class may sue. Thus, contrary to the view of the Tenth Circuit (A11-12), any problem of apportioning damages in this case is entirely distinct from the problem in those cases.

Finally, because the injury to the consumer due to the overcharge and the injury to the utility from lost sales involve two completely different sets of transactions (A54), "the possibility of inconsistent adjudications—and therefore unwarranted multiple liability for the defendant" (431 U.S. at 730) is obviated here. Indeed, the Tenth Circuit did not seek to justify its conclusion even in part on the rationale that the defendant pipelines would be subject to duplicative recovery if the States, as



*parens patriae*, rather than utilities, are permitted to sue.[18]

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[18] *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982) is especially instructive. There, a group health plan subscriber brought an antitrust action against her health insurer and an organization of Virginia psychiatrists alleging that the health plan's refusal to reimburse her for psychotherapy performed by psychologists was due to an unlawful conspiracy by defendants. This Court rejected the contention, among others, that *Illinois Brick* and *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), precluded her from suing under § 4 of the Clayton Act:

> *Both cases focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws.* But permitting respondent to proceed in the circumstances of this case offers not the slightest possibility of a duplicative exaction from petitioners. McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services. [457 U.S. at 474-475 (emphasis added).]

(The dissenting Justices did not base their conclusion on the theory that the subscriber may not sue under *Illinois Brick*. See *id.* at 486-92 (Rehnquist, J.), relying on the distinct standing limitation of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486-489 (1977). See also *id.* at 492-95 (Stevens, J.))

The only reference to *Hanover Shoe* or *Illinois Brick* in either dissenting opinion was the following:

> Those subscribers who did yield to Blue Shield's pressure suffer antitrust injury indirectly because of suppressed competition in the psychotherapy market. * * * I do not understand the Court to conclude that *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), would not bar recovery by a subscriber, as opposed to a psychologist, in the latter situation. [457 U.S. at 487 n.2 (Rehnquist, J., dissenting).]

We believe that this is a correct reading of the majority opinion in *Blue Shield*, and that implicit therein is the dissenting Justices' understanding that the psychologists who lost patients due to the alleged violation could recover for that injury.

### D. Under the Foregoing Analysis and the Facts of This Case the Judgment of the Tenth Circuit Must be Reversed

While the Illinois natural gas system discussed in *Panhandle* presented an especially strong case for allowing residential consumers (or the Attorney General for the State as *parens patriae*) to sue, the differences between *Panhandle* and this case do not call for a different result. The natural gas regulatory systems in Kansas and Missouri operate in essentially the same manner as Illinois' system.[19] Like Illinois, Kansas and Missouri both utilize PGA clauses to ensure that all natural gas costs are passed on from utility to consumer, both require that utilities file forms which place pricing and volume information in the public record, and consumers' gas bills in both States contain separate entries for the cost of gas.[20] Hence, proving that residential consumers are the true injured parties, and calculating the amount of their damages, is as easy in Kansas and Missouri as it is in Illinois. Even though the utilities have prosecuted their antitrust claims here, proving the separate and distinct injury suffered by residential consumers remains an equally simple endeavor, by virtue of the PGA clauses and the entire regulatory scheme.[21]

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[19] *See* Joint Brief of Plaintiff-Appellants the States of Kansas and Missouri in the court below, at 6-10, for a description of the operation of Kansas and Missouri's natural gas regulatory systems. This brief is referenced in the parties' Appendix in this Court and is therefore part of the record.

[20] *Id.* at 7-10.

[21] The Tenth Circuit relied on the fact that the present case involves "utilities occupying different levels on the distribution chain." A13. This refers to the fact that one of the three utilities that brought suit, Kansas Gas & Electric, does not distribute natural gas. A6. But this circumstance is entirely unrelated to the concern in *Hanover Shoe* and *Illinois Brick* that more than one person should not be permitted to recover on the basis of the same



## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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sale. In fact, Missouri and Kansas, on behalf of consumers, are not seeking recovery for overcharges paid by Kansas Gas & Electric (hereinafter "KG&E") because these overcharges were not passed on to the consumers. KG&E's participation in the suit against the pipeline does not make the suit more complex in any sense which affects the pass-on analysis. That KG&E does not distribute natural gas simply means that there is no need to determine who may bring suit regarding the overcharges paid by KG&E.

# APPENDIX

**APPENDIX**

ILLINOIS ADMINISTRATIVE CODE

TITLE 83: PUBLIC UTILITIES
CHAPTER I: ILLINOIS COMMERCE COMMISSION
SUBCHAPTER d: GAS UTILITIES

PART 525
UNIFORM PURCHASED GAS ADJUSTMENT CLAUSE
(GENERAL ORDER 212)

Section



AUTHORITY: Implementing Section 36 and authorized by Section 8 of "AN ACT concerning public utilities" (Ill. Rev. Stat. 1981, ch. 111 ⅔, pars. 36 and 8).

SOURCE: Adopted at 6 Ill. Reg. 12437, effective September 30, 1982; emergency amendment at 7 Ill. Reg. 2002, effective February 1, 1983, for a maximum of 150 days; amended at 7 Ill. Reg. 7919, effective June 22, 1983; codified at 8 Ill. Reg. 12186.

**Section 525.10 Rider: Gas Charge and Refund Adjustment Applicable to All Service Classifications**

a) The Gas Charge and Refund Adjustments, applicable to all service classifications, shall be deter-

mined in accordance with the provisions of this rider.

AGENCY NOTE: The Gas Charge may be set forth in the utility's rate schedule in either of two forms:

1) a total charge determined monthly under the rider, in which case each individual service classification will contain a provision to the effect that the rates for service include a Gas Charge determined under the rider; or

2) a base charge stated in each individual service classification and there identified as the Gas Charge, subject to adjustments determined monthly under the rider.

This text of the rider assumes the first alternative. Where the second alternative is chosen, the utility must make appropriate revisions to the text.

b) Costs recoverable through the Gas Charge (Sections 525.20, 525.30 and 525.40), and annual reconciliation (Section 525.50 and Factor R4 of Section 525.60) shall include the cost of the following:

1) any solid, liquid or gaseous hydrocarbons purchased for injection into the gas stream, purchased as feedstock or fuel for the manufacture of gas, or delivered to the company under an exchange agreement,

2) storage service purchased under any rate, tariff or contract subject to regulation by a federal or state agency, and

3) transportation costs related to such solid, liquid or gaseous hydrocarbons and storage service.



c) The cost of the foregoing items shall exclude demurrage charges and penalty charges including but not limited to charges for late payment and unauthorized overruns and lost discounts. For exchange arrangements under which the company acquires gas for the purpose of supplying its distribution customers, costs recoverable through the Gas Charge and annual reconciliation shall include service charges, exclusive of interest and carrying charges, incurred by the company and recorded in Accounts 806 or 813. Determinations of the Gas Charge and annual reconciliation shall exclude the cost of gas used by the company, gas sold outside the company's distribution system, and gas delivered by the company under an exchange agreement. The cost of gas placed into storage inventory shall be included in the Gas Charge and annual reconciliation to the extent such gas is withdrawn from storage for sale to customers.

d) On or before the sixth day of each month, the company shall file with the Commission an information sheet specifying the Gas Charge and all Refund Adjustments to be effective for service rendered in the following month as provided in Section 525.20 and 525.60. Such filing shall include a statement showing the determination of such Gas Charge and the determination of a Refund Adjustment under Section 525.60, each determination to be accompanied by data in explanation thereof.

AGENCY NOTE: Where the determination of the Gas Charge includes the cost of a transaction between the utility and an unregulated affiliate, the computation sheet showing the transaction shall be footnoted to indicate that the transaction is with an affiliate.

e) As used in this rider:

1) the term "filing month" shall mean the month in which a Gas Charge or a Refund Adjustment is determined by the company and filed with the Commission;

2) the term "base period" shall mean the first 12 of the 13 months immediately preceding the filing month;

3) the term "applicable inventory price" shall mean the price applicable to gas capitalized or to gas or feedstock stored or withdrawn from inventory as reflected on the books of the company for a given month;

4) the term "system average cost of gas" shall mean, for a given month, the weighted average cost per therm of gas purchased and manufactured as reflected in Factors G and MG included in the Gas Charge filed in such month;

5) the term "gas used by the company" shall include all gas used by the company except gas utilized in the manufacture of gas through a reforming process reflected in Factor MG or Factor SG, and shall include gas furnished to municipalities or other governmental authorities without reimbursement in compliance with franchise, ordinance or similar requirements.

(Source: Amended at 7 Ill. Reg. 7919, effective June 22, 1983)

**Section 525.20 Determination of Gas Charge**

a) Each month the company shall determine under this Section the Gas Charge to be placed into effect with service rendered on and after the first day of the month following the filing month. Unless otherwise



ordered by the Commission, such Gas Charge shall become effective as indicated in the information sheet filed with the Commission and shall remain in effect until superseded under the terms of this rider.

b) The Gas Charge shall be determined in accordance with the following formula:

$$GC = \frac{G + MG + SG \pm St + PS \pm SE - C \pm RB}{P\,(1 - U)} \times 100$$

Where:

GC = The Gas Charge in cents per therm rounded to the nearest 0.01¢; any fraction of 0.01¢ shall be dropped if less than 0.005¢ or, if 0.005¢ or more, shall be rounded up to the next full 0.01¢.

G = The sum of the cost ($) of individual gas supplies as prescribed in Section 525.30.

MG = The sum of the cost ($) of individual manufactured gas supplies as prescribed in Section 525.30.

SG = The sum of the cost ($) of individual supplemental supplies as prescribed in Section 525.30.

St = The cost ($) of gas withdrawn from (+) and injected into (-) storage as prescribed in Section 525.30.

PS = The sum of the cost ($) of individual purchased storage services as prescribed in Section 525.30.

SE = The sum of the cost ($) of gas sold outside the company's distribution system (-) and gas delivered by the company (-) or delivered to the company (+) under an exchange agreement, as prescribed in Section 525.30.

C = The cost ($) of gas used by the company as prescribed in Section 525.30.

RB = An amount representing the estimated reconciliation balance ($) for the company's reconciliation year which includes the month following the filing month, as prescribed in Section 525.30 (costs in excess of revenues, +RB; revenues in excess of costs, -RB).

P = For the base period, the sum of therms of gas purchased, manufactured, withdrawn from storage and delivered to the company under an exchange agreement minus the sum of therms stored, used by the company, sold outside the company's distribution system, delivered by the company under an exchange agreement, utilized in the manufacture of gas through a reforming process reflected in Factor MG or Factor SG, and required as compressor fuel in connection with a storage service reflected in Factor PS.

U = Unaccounted for gas for the most recent 12 months ended (month) as a percentage of distribution sales plus unaccounted for gas for the same period, expressed as a decimal.

AGENCY NOTE: The utility shall use a 12 month period, ending with the month June, July or August, which had the lowest average percentage of unaccounted for gas determined by averaging the annual percentages for the preceding 5 years; once established the period must be consistently used until a change is approved by the Commission.

(Source: Amended at 7 Ill. Reg. 7919, effective June 22, 1983)

**Section 525.30 Determination of Factors for Gas Charge Formula**

The factors included in the Gas Charge formula under Section 525.20 shall be determined as follows:



a) Purchased Gas (Factor G)

For each gas supply purchased during the base period:

1) Multiply the number of units of demand (capacity) and units of commodity by the respective charges in effect on the first day of the filing month; if there is no purchase of a specific supply for the filing month, the last charge(s) paid for such supply purchased during the base period shall be used.

2) Add to the amounts determined under the foregoing paragraph (1) the cost for each such supply of any separately stated charge for transportation, based on the charge in effect on the first day of the filing month; if there is no purchase of such supply for the filing month, the last transportation charge paid for such supply purchased during the base period shall be used.

b) Manufactured Gas (Factor MG)

For each type of gas manufactured and made available to the company's distribution system during the base period:

1) Multiply the number of units of each supply feedstock or fuel purchased during the base period by the charge for such supply, including transportation, in effect on the first day of the filing month; if there is no purchase of a specific supply for the filing month, the last charge paid for such supply purchased during the base period shall be used.

2) For each supply of feedstock or fuel determine the difference between

A) the units of such supply placed into inventory during the base period multiplied

by the latest applicable inventory price for the base period, and

B) the units of such supply withdrawn from inventory during the base period multiplied by the applicable inventory price for the last month of the base period.

3) If in the foregoing determination (A) is larger than (B), the amount of such difference shall be assigned a negative value; if (B) is larger than (A), the amount of such difference shall be assigned a positive value.

c) Supplemental Gas (Factor SG)

For each supplemental gas supply (temporary and emergency) purchased or manufactured during the base period: multiply the number of units purchased each month of the base period by the rate charged for such month by the company's supplier and add transportation charges, if any; in the case of a supply initially accounted for as an inventory item, multiply the number of units taken from inventory each month of the base period by the applicable inventory price for such month.

d) Storage Gas (Factor St)

For each type of gas storage facility, determine the difference between

1) the units of gas capitalized or inventoried during the base period multiplied by the applicable inventory price for the last month of the base period or, in the case of gas returned to cushion, by the average cost of all gas previously withdrawn from cushion; and

2) the units of gas withdrawn from storage during the base period multiplied by the applicable inventory price for the last month of the base period or, in the case of gas withdrawn from cushion, by the system average cost of gas for the month in which such withdrawal is made.



3) If the foregoing determination (1) is larger than (2), the amount of such difference shall be assigned a negative value; if (2) is larger than (1), the amount of such difference shall assigned a positive value.

e) Purchased Storage Service (Factor PS)

For each storage service purchased during the base period under a rate, tariff or contract subject to regulation by a federal or state agency:

1) Multiply the units of demand (capacity) and units of commodity by the respective charges in effect on the first day of the filing month; if there is no purchase of a specific storage service for the filing month, the last charges paid for such storage service purchased in the base period shall be used.

2) Add to the amounts determined under the foregoing paragraph (1) the cost for each such storage service of a separately stated charge for transportation based on the charge in effect on the first day of the filing month; if there is no purchase of a specific storage service for the filing month, the latest transportation charge paid for such storage service purchased during the base period shall be used.

f) Sales and Exchanges (Factor SE)

1) For gas sold outside the company's distribution system, multiply the sum of the units of gas sold during each month of the base period by a unit cost equal to the Gas Charge filed during each such month exclusive of the effects of Factor RB and Refund Adjustments under Section

525.60. The total of amounts determined under this paragraph shall be assigned a negative value.

2) For gas delivered by the company under an exchange agreement, multiply the units of gas delivered during each month of the base period by the system average cost of gas for each such month, or in the case of gas returned by the company under an exchange agreement, by the applicable unit cost of gas to be returned under such agreement as reflected on the books of the company for each such month. The total of amounts determined under this paragraph shall be assigned a negative value.

3) For gas delivered to the company under an exchange agreement, multiply the units of gas delivered during each month of the base period by the system average cost of gas for each such month, or in the case of gas returned to the company under an exchange agreement, by the applicable unit cost of gas to be returned under such agreement as reflected on the books of the company for each such month. Add to the amounts determined under the foregoing sentence any transportation charges and service charges, exclusive of interest and carrying charges, incurred by the company and recorded in Accounts 806 or 813 for each month of the base period for each exchange arrangement under which the company acquires gas for the purpose of supplying its distribution customers. The total of amounts determined under this paragraph shall be assigned a positive value.

g) Company Use (Factor C)

For gas used by the company during the base period: multiply the number of units used by the company by the system average cost of gas for the



filing month. For the purposes of this rider, gas used by the company shall include gas furnished to municipalities or other governmental authorities without reimbursement in compliance with franchise, ordinance or similar requirements; gas used by the company shall not include gas utilized in the manufacture of gas through a reforming process reflected in Factor MG or Factor SG.

h) Reconciliation Balance (Factor RB)

Each month the company shall determine, in the manner contemplated by Section 525.50, the anticipated reconciliation balance for the reconciliation year which includes the month following the filing month. If in such determination anticipated revenues exceed or fall short of anticipated costs by more than one-half of one percent, the anticipated reconciliation balance shall constitute the amount to be reflected as Factor RB in the determination of the Gas Charge to be effective for service rendered in the month following the filing month; the same amount shall be reflected as Factor RB in the determinations of Gas Charges to be effective for service rendered in the remaining months of the same reconciliation year unless a subsequent determination under this paragraph requires a change. If the anticipated reconciliation balance represents costs in excess of revenues, Factor RB shall be assigned a positive value; if the anticipated reconciliation balance represents revenues in excess of costs, Factor RB shall be assigned a negative value.

(Source: Amended at 7 Ill. Reg. 7919, effective June 22, 1983)

**Section 525.40 Changes in Gas Supply**

Where a change in gas supply occurs during the month prior to the filing month and would cause the revenues

arising through the application of the Gas Charge for the 12-month period beginning with the month following the filing month to exceed or fall short of the costs recoverable through the Gas Charge for the same period by one-half of one percent or more, the company shall reflect such change in the determination of the Gas Charge to become effective with service rendered in the month following the filing month by adjusting on an annual basis the units of supply for each factor affected by such change. Such change shall be reflected in subsequent determinations of the Gas Charge until it is fully reflected in the units of supply for the base period. The company shall, in the statement showing the determination of the Gas Charge, identify those factors which reflect such change. For the purposes of this paragraph, the revenues arising through the application of the Gas Charge and the costs recoverable through the Gas Charge shall be determined in the manner contemplated by Section 525.50, except that such revenues shall not include the effect of Factor RB.

**Section 525.50 Annual Reconciliation**

a) Within 60 days after the end of each reconciliation year, the company shall file with the Commission a statement showing the determination of the reconciliation balance for such year; certified by the company's independent public accountants and verified by an officer of the company. The reconciliation balance shall be the difference between

1) the costs recoverable through the Gas Charge as recorded on the books of the company for such year, exclusive of any credits or debits relating to amounts reflected in factors of the Refund Provisions of Section 525.60, and

2) the revenues arising through the application of the Gas Charge to therms sold by the company during such year, exclusive of the effect of Refund Adjustments under Section 525.60. In the determination of costs recoverable through the Gas Charge under the foregoing sentence, the cost assigned to gas sold outside the distribution system shall be reflected as a credit. The reconciliation balance shall be refunded or recovered under R4 of the Refund Provisions of Section 525.60. If the reconciliation balance represents costs in excess of revenues, Factor R4 shall be assigned a negative value; if the reconciliation balance represents revenues in excess of costs, Factor R4 shall be assigned a positive value. The company's reconciliation year shall be the 12-month period ending the — day of (month).

AGENCY NOTE: The cost assigned to gas sold outside the distribution system shall be determined for each sale by order of the Commission.

b) Unless otherwise ordered by the Commission, the company shall include the reconciliation balance in the Refund Adjustment calculated and filed with the Commission in the third month following such reconciliation year. If upon hearing under the fifth paragraph of Section 36 of the Illinois Public Utilities Act, the Commission finds that the reconciliation balance for such reconciliation year should be higher or lower than such balance as reflected in a Refund Adjustment previously made effective under Section 525.60, the difference between the reconciliation balance as found by the Commission and such balance as reflected in a Refund Adjustment shall be refunded or recovered, as appropriate, under R4 of the next Refund Adjustment made effective under Section 525.60.

(Source: Amended at 7 Ill. Reg. 7919, effective June 22, 1983)

**Section 525.60 Refund Provisions**

a) Each month the company shall determine a Refund Adjustment under this Section. If such Refund Adjustment computes to 0.01¢ per therm or more, it shall be subtracted from the Gas Charge over an annual billing cycle beginning with service rendered on and after the first day of the month following the filing month. If such Refund Adjustment does not compute to at least 0.01¢ per therm, the amounts reflected in the determination shall be retained in a Refund Due Customer Account until an adjustment subsequently determined under this Section, including any amounts so retained, computes to at least 0.01¢ per therm. The monthly determination of a Refund Adjustment shall be included in the statement filed with the Commission in connection with the Gas Charge.

b) Refund Adjustments shall be determined in accordance with the following formula:

$$RA = \frac{R1 - R2 + i(R1 - R2 \pm R4) \pm R3 \pm R4 + R5 + R6}{P(1 - U)} \times 100$$

Where:

RA = The Refund Adjustment in cents per therm; provided that if the adjustment computes to 0.01¢ per therm or more, any fraction of 0.01¢ shall be dropped if less than 0.005¢ or, if 0.005¢ or more, shall be rounded up to the next full 0.01¢.

R1 = Any amount including interest received by the company from a supplier during the second month prior to the filing month by reason of any refund, adjustment, rebate or credit of charges paid by the company and used in the calculation of the Gas Charge.



R2 = Increases in charges made effective retroactively to months prior to the filing month and applicable to such supplies previously purchased and charged to gas distribution system customers under Factors G, MG, SG and PS of the Gas Charge.

R3 = Amount due customers (+R3) or amount due the company (-R3) as a consequence of any prior Refund Adjustment, computed at the termination of the appropriate billing cycle ending during the second month prior to the filing month.

R4 = The annual reconciliation balance for the preceding reconciliation year determined under Section 525.50 (costs in excess of revenues, -R4; revenues in excess of costs, +R4).

R5 = A credit for sales made outside the company's distribution system during the second month prior to the filing month equal to one-half of the difference between the revenue billed for such sales and the cost assigned to the gas sold plus other direct expenses.

AGENCY NOTE: The cost assigned to the gas sold and other direct expenses shall be determined for each sale by order of the Commission.

R6 = The amount to be refunded by reason of the refund provision of (rider relating to incremental pricing) for the second month prior to the filing month.

i = An interest factor of 6⅔%, expressed as a decimal, to be applied to the total of R1, R2 and R4.

AGENCY NOTE: The factor of 6⅔% represents an annual rate of 10% of the unrefunded balance of R1, R2 and R4 over a 14-month period, assuming that the full balance is outstanding for two months, the approxi-

**mate period before items reflected in Factors R1, R2 and R4 would begin flowing through a Refund Adjustment, and that the balance declines by one-twelfth of the total of R1, R2 and R4 each month over the annual billing cycle of 12 months during which a Refund Adjustment would be reflected in rates.**

**P = Same as for GC formula.**

**U = Same as for GC formula.**

c) Should a Refund Adjustment more nearly pay out at the end of 11 or 13 months, the refund period may be shortened or lengthened accordingly upon the company giving 25 days' notice to the Commission of the change in the refund period.